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No. _____

In the

Supreme Court of the United States

ENCINITAS COUNTRY DAY SCHOOL, INC., a California corporation, dba ENCINITAS COUNTRY DAY SCHOOL; KATHLEEN PORTERFIELD, an individual; and M&M DEVELOPMENT COMPANY, a limited liability corporation,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Fourth District Court of Appeal for the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below incorrectly apply the standard that a taking occurs when a regulation fails to "substantially advance a legitimate state interest" by concluding (a) that a claimant must first show that the challenged restrictions prevented all economically viable use of property and (b) that the claimant must also show that an unlawful regulation was imposed solely for the purpose of delaying use of the property?

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PETITION FOR WRIT OF CERTIORARI

Encinitas Country Day School, Inc., M & M Development Company, and Kathleen Porterfield respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District.

OPINIONS BELOW

The Opinion of the California Court of Appeal, Fourth Appellate District, is partially reported at 133 Cal. Rptr. 2d 551 (May 8, 2003); the full opinion appears as Exhibit A to the petition. The decisions of the Superior Court for San Diego County are not reported; they appear at Exhibits C, D, and E.

JURISDICTION

The judgment of the California Court of Appeal, Fourth Appellate District, was entered on May 8, 2003. Petition Appendix (Pet. App.) at Exhibit A-1. On June 5, 2003, the Court of Appeal, Fourth Appellate District, denied the petition for rehearing. Pet. App. at Ex. F. The California Supreme Court denied review on July 23, 2003. Pet. App. at Ex. B. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use without just compensation."[1]

[1] Though the court below did not expressly state that it was ruling on federal constitutional grounds, it did rely largely on this Court's jurisprudence in analyzing the plaintiffs' takings claims. In (continued...)

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Factual Background

Since 1988, Encinitas Country Day School (School) has operated a small school on Encinitas Boulevard in the coastal town of Encinitas, California. Anticipating growth in its student enrollment, the School began planning to build a new facility in the mid-1990s. In 1998, the School secured approval from the City of Encinitas (City) to build a 432-student elementary school on a 20-acre parcel of undeveloped property. The property was located between Manchester Avenue, a public road, and a lagoon. Another undeveloped parcel of land sat between the School's property and the lagoon. Highway 101, a four lane freeway, separated the project site from the Pacific Ocean and the beach areas.

The California Coastal Commission (Commission) has regulatory authority to review projects approved by the City of Encinitas if the projects are either (1) on parcels between the coast and the first public road paralleling the sea or (2) within 100 feet of wetlands in the Coastal Zone. The Commission and its staff contended that the Commission's jurisdiction over this site would be limited to the area within 100 feet of the wetlands on the property. *See* Pet. App. at Ex. A-6. The School had

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[1] (...continued)
announcing the standard under which a takings claim is analyzed, the court of appeal stated it in reference to whether "the land has been taken for the benefit of the public at large under the Fifth Amendment of the United States Constitution." Pet. App. at Ex. A-17. Thus, the Fifth Amendment, incorporated through the Fourteenth Amendment, is fairly implicated.

subsequently designed the project so that it would not encroach upon the 100-foot buffer for wetland areas and would not trigger Commission jurisdiction. This left the Commission without a basis for jurisdiction because, for 20 years, the Commission had considered Highway 101 to be the first public road from the sea and thus the inland boundary of the Commission's jurisdiction. *See* Pet. App. at Ex. D-3 to D-4. The Commission had made this position clear to the public since 1981. *Id.*

In a period of 48 hours, however, "the Coastal Commission staff, completely bypassing Regulation 13576 [procedure for establishing regulatory appellate jurisdiction], obviated the jurisdictional map in effect since 1981 and extended its jurisdiction over the school project and other property by asserting Manchester as [the] first public road for purposes of appellate jurisdiction." Pet. App. at Ex. D-5.[2] The Commission's new and hurried interpretation of Manchester Avenue as the first public road permitted it to exercise regulatory jurisdiction over the entire project.

The Commission followed up its sudden assertion of geographical jurisdiction with a novel interpretation of the time limits for scheduling a hearing on the appealed project. The Coastal Act requires a hearing on an appealed matter to be set within 49 days of the date of appeal, but, in the School's case, the Commission interpreted this rule to mean that it could comply with the deadline by simply opening the matter within

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[2] The San Elijo Lagoon Conservancy (SELC), identified in the caption of the appellate opinion as "Real Party in Interest," appealed the City's approval of the School's project to the Commission. *See* Pet. App. at Ex. A-5. But while SELC initially participated in the trial court proceedings as a real party, the trial court later found that the organization lacked standing to participate in any capacity other than as an amicus curiae. Pet. App. at Ex. D-2 to D-3. Therefore, SELC is not a party before this Court.

49 days and postponing it. *See* Pet. App. at Ex. D-3. This interpretation allowed the Commission to put off consideration of any substantive issues, including whether a substantial (and thus appealable) issue existed, the scope of its appellate jurisdiction, or the merits of the appeals. The Commission later held several hearings, ultimately denying the project. *See* Pet. App. at Ex. D-4.

Judicial Proceedings

Following the Commission's denial of the project, the School filed suit in the Superior Court for San Diego County, alleging a regulatory taking and seeking a writ of mandate compelling the issuance of the permit. The trial court bifurcated the matter, hearing the writ of mandate petition before the inverse condemnation claim. The trial court granted the writ of mandate and set aside the Commission's denial. Pet. App. at Ex. E-2 to E-3. The court found that jurisdiction based on the new definition of "first public road" was invalid and that the Commission violated California law by failing to resolve the matter within the statutorily required 49 day period. *See* Pet. App. at Ex. E-3; *see also* Cal. Pub. Res. Code § 30621. Because the Commission's denial was invalid, the decision by the City of Encinitas approving development was deemed final, and the project was permitted to go forward.

The School then pursued its inverse condemnation claim on the grounds that the Commission's actions failed to substantially advance a legitimate state interest. After a three-day bench trial, the judge concluded that many of the reasons the Commission offered for its actions "were pretextual, and . . . the staff's actions were in fact taken for no purpose other than to delay the project." Pet. App. at Ex. D-5. In addressing the Commission's assertion of jurisdiction based on Manchester Avenue as the first public road, the trial court declared that "[i]t is hard to think of a more unreasonable and arbitrary position." *Id.* However, the court found that the

actions of the Commission staff could not be attributed to the Commission. Pet. App. at Ex. D-5 to D-6. It also found that the Commission's "erroneous conclusions were not completely unreasonable from a legal standpoint," Pet. App. at Ex. D-6, reasoning that "perhaps some rational attorney could believe that the arguments . . . had merit." *Id.* at Ex. D-3. Relying on "the extraordinarily high standard for determining that error by the Commission constitutes a regulatory-delay 'taking,' " and the conclusion that the Commission staff could not bind the Commission, the trial court found that there was no taking. *See id.* at Ex. D-6.

Both sides appealed the judgment to the California Court of Appeal, Fourth Appellate District. The court of appeal upheld the judgment, but on different grounds. First, it concluded that the trial court was correct in ruling that the Commission lost jurisdiction by failing to hold hearings within the statutorily required 49 day period. It then declined to address the geographic jurisdictional issue because of its earlier holding that the Commission had acted unlawfully in retaining jurisdiction. *See* Pet. App. at Ex. A-16.

The court of appeal also concluded that the actions of the Commission staff *did* bind the Commission. Nevertheless, it denied the regulatory takings claim. The court of appeal first concluded that the School failed to meet its "threshold burden" of demonstrating that it was deprived of all economically viable use of the property. Pet. App. at Ex. A-25. It also found no taking because it held that the plaintiffs did not show that the Commission's unlawful action failed to substantially advance a legitimate state interest because it was not "so unreasonable as to lead to an inference that it was done for the purposes of delay." Pet. App. at Ex. A-23. The court of appeal also concluded that a suit to invalidate the government's denial of a project is "a normal part of the development process" and that the substantial advancement test is satisfied as long as the government does not act "arbitrarily and capriciously without

a legitimate basis . . . seeking only to delay or discourage development." *See* Pet. App. at Ex. A-20. Thus, the court of appeal found no taking.

SUMMARY OF ARGUMENT

This Court has repeatedly declared that a land use regulation will cause a taking if it "does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land." *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added). The court below and other lower courts have, however, been unable to apply these standards consistently and fairly when they are faced with a challenge to an unlawful land use regulation.

In the decision below, the court concluded that actions inconsistent with the law could cause a taking only if they prevented all economic use of property *and* if they do so without substantially advancing a legitimate state interest. The court further held that unlawfulness alone was not sufficient to satisfy the substantial advancement test. In the lower court's view, an unlawful land use regulation violates the substantial advancement test only upon a showing that a regulation denying all economically viable use was designed solely to delay the use of property.

This case, therefore, raises several important and controversial issues concerning the circumstances under which an unlawful restriction on property causes a taking under the substantial advancement test. Specifically, the case presents a threshold issue of whether such a restriction can trigger a taking under the substantial advancement test absent a showing of a denial of all economic use. It then presents a more difficult issue of whether the unlawfulness of the regulation is enough to trigger a violation of the substantial advancement test where

there is no evidence of a deliberate intent to obstruct development.

By answering these questions in the negative, the decision below has rewritten the disjunctive *Agins* test as a conjunctive standard and converted "substantial advancement" from a means-ends tests into a test focused purely on the legitimacy of the ends. Consequently, under the lower court's understanding, the test for whether an unlawful regulation causes a taking is whether the regulation prevented all use of property for the specific purpose of delaying such use. This highly deferential version of the substantial advancement test is not shared by this Court or many of the lower courts. In fact, lower court decisions conflict on how to apply the substantial advancement test to unlawful regulation. This Court should grant this petition to resolve the conflicts and disarray among the lower courts concerning whether and how a land use regulation that is unauthorized by law violates an independent substantial advancement takings test.

ARGUMENT

I

THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING WHETHER THE SUBSTANTIAL ADVANCEMENT TEST APPLIES TO UNLAWFUL LAND USE REGULATION WITHOUT EVIDENCE OF A COMPLETE ECONOMIC LOSS OR INTENTIONAL DELAY

A. In Requiring a Denial of All Economically Viable Use of Property, the Decision Below Raises an Important Question Concerning the Independent Nature of the Substantial Advancement Test

This Court has consistently explained that a taking occurs when a regulation fails to substantially advance a legitimate state interest, without regard to whether the claim also alleges

a denial of economically viable use. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-35 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Thus, it is well-recognized that the substantial advancement test was created and has been employed as an independent standard for an unconstitutional taking. *See, e.g.*, 11 McQuillin Mun. Corp. § 32.28 (3d ed. 2003) ("A 'taking' is deemed to have occurred where the application of a zoning ordinance to a particular property does not substantially advance legitimate state interests, *or* where the ordinance denies an owner economically viable use of his or her land.") (emphasis added); 8A Mich. Civ. Jur. Eminent Domain § 14: Factors for Determining Taking ("Land use regulations effect a taking in two general situations: When they do not substantially advance a legitimate state interest, *or* when they deny an owner economically viable use of his land.") (emphasis added); *see also* Daniel R. Mandelker & John M. Payne, *Planning and Control of Land Development: Cases and Materials* 119 (5th ed. 2001) (the *City of Monterey* trial court "essentially put the case to the jury on the first prong of *Agins*, and because it was a general verdict, it had to be presumed that the jury had decided on this theory," the verdict being subsequently upheld by the Supreme Court).

The articulation and application of the substantial advancement and denial of all economically viable use tests as separate, independent standards makes sense because they are designed to answer the same constitutional question through different analytical lenses. To address the ultimate takings question of whether a property owner has been required to bear a burden that should be borne by the public as a whole, the tests focus on different characteristics of the challenged regulations. The substantial advancement standard seeks to identify when the government is foisting public costs onto individuals by

asking whether the *means* used to achieve legitimate land use goals are excessive or illegitimate. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1651-52 (1988) (stating that one key to understanding *Nollan*, which applied the substantial advancement test, is its emphasis on preventing societal burdens from being borne by only one landowner); Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 Denv. U. L. Rev. 893, 905-06 (1995) (explaining that a taking occurred in *Dolan* under the substantial advancement test because the government sought to single out Ms. Dolan to bear the burden of providing a public park area, where the city's only legitimate interest was in stopping flooding of the area). Conversely, the "denial of all economically viable use" test seeks to determine whether the *impact* of otherwise legitimate means is so severe as to give rise to an inference that the property owner has been compelled to donate property to the public. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-18 (1992).

When a land use regulation advances a legitimate public goal by an illegitimate or disproportionate mechanism, one that forces the property owner to shoulder public burdens, a taking claim arises due to a failure to substantially advance a legitimate interest. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 334 ("[A]part from the District Court's finding that TRPA's actions represented a *proportional response* to a serious risk of harm to the lake, petitioners *might have argued that the moratoria did not substantially advance a legitimate state interest*, see *Agins* and *Monterey*.") (emphasis added). When the government uses legitimate regulatory mechanisms, but does so to prevent all economically beneficial use, a taking also occurs due to the severity of the impact. *See Lucas*, 505 U.S. at 1019.

Yet, the decision below concluded that a takings claimant challenging unlawful land use regulation must show that the

regulation denies all economically viable use *and* that the regulation fails to substantially advance a legitimate state interest. *See* Pet. App. at Ex. A-23. In this way, the lower court requires the property owner to show that he bears a burden that is rightfully borne by the public by both suffering regulation that is not a legitimate means and by suffering regulation so severe in scope and impact that the owner is required to leave property in a natural state for the public good. There is nothing in the Takings Clause, however, that justifies requiring the takings claimant to labor under this redundancy; rather, once the claimant has established that he is being forced to bear public burdens, a taking occurs. Indeed, if the owner can establish this situation though application of the substantial advancement test, compelling him to show it again under an economic impact test is unfair and incompatible with the design and purposes of the federal Takings Clause.

B. In Foisting the Burden of Illegal Land Use Regulation upon Property Owners, the Decision Below Raises an Important Question Concerning Whether Unlawfulness Triggers a Failure to Substantially Advance a Legitimate State Interest

The substantial advancement test focuses on the legitimacy and proportionality of the regulatory tool used to achieve a desired social good. Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's* Nollan, Dolan, *and* Del Monte Dunes *Decisions*, 34 Urb. Law. 155, 159 (2002) ("The substantially advance test has been held to require a real examination of 'the nexus between *the effect* of the ordinance and the legitimate state interest it is supposed to advance.' The test has been applied both to legislative restrictions and permit denials.") (footnote omitted). But, according to the court below, an unlawful property restriction fails to substantially advance a legitimate state interest only if the restriction is " 'so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other

than to delay the development project.'" Pet. App. at Ex. A-19 (quoting *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1199 (Cal. 1998)).

Barring review by this Court, the state of the law will be that absent evidence of intentional delay, the government's expressed intent to serve legitimate ends serves to immunize even a patently illegal land use restriction from a substantial advancement violation. *See* Douglas W. Kmiec, *The "Substantially Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, *in Taking Sides in Takings Issues* 371, 382 (§ 16.7) (Thomas E. Roberts ed., 2002) ("California landowners [are] without [an] effective remedy for wrongful assertions of governmental jurisdiction over property. . . . [D]eferential review effectively immunizes governmental agencies by allowing for post hoc rationalization that illegal action somehow serves a legitimate governmental interest. Something is seriously amiss."). In this approach, the illegality of the restriction has no independent constitutional import; all that matters is whether the restriction was imposed to advance the illegitimate goal of delaying the use of land. *See, e.g.*, *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79, 79-81 (Ct. App. 2002), *cert. denied*, 124 S. Ct. 67 (2003) (finding no taking because the government action, though unlawful, was taken to carry out a substantial government interest in land use planning, not to delay development); *Landgate*, 953 P.2d at 1200 (unlawful assertion of jurisdiction that prevented all economic use of property did not cause a taking because unlawful action was not designed to delay development).

The rule adopted below reduces the means-focused "substantial advancement" standard to an "illegitimate state interest" test. Moreover, the only illegitimacy that is recognized is a design to delay the use of property. The rule therefore places on the claimant the nearly insurmountable burden to prove that land use regulators *intended* to interfere

with the owner's right to use property before he may prevail on a claim that the unlawful regulation caused an unconstitutional taking. *See, e.g.*, Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 Const. Comment. 7, 22 (1996) ("Under an interpretation of the Takings Clause requiring the deliberate destruction of property as the predicate for receiving just compensation," property owners will be unable to establish that even the most severe, unlawful restrictions are unconstitutional.); Paul M. Hendrick, *Racism in American Land Use Decisions: The Slicing of the American Pie*, 2 Fla. Coastal L.J. 395, 413-14 (2001) (noting the difficulty of claims requiring proof of discriminatory intent by the government).

In hinging the substantial advancement violation on a covert design to delay development rather than on excessive or inappropriate means such as unlawful regulation, the decision below foists unfair burdens on the shoulders of the property owner. In particular, absent evidence of an intent to delay property use, unlawful land use regulation and litigation to invalidate it are a " 'normal part of the development process' " that the property owner must accept. Pet. App. at Ex. A-20 (citing *Landgate*, 953 P.2d at 1188). More importantly, any costs arising from a "normal," unlawful development delay are to be borne by the innocent property owner, rather than the offending governmental actors. So, when it acts without authorization of law, the government must only give up the regulatory authority it never rightfully had; the property owner, though, must pay for the government's failure to adhere to the law. *See, e.g.*, *Loewenstein*, 127 Cal. Rptr. 2d at 94; *see also Landgate*, 953 P.2d at 1204. The fundamental principles of fairness underlying the Takings Clause prohibit such a result.

Nor is the rule of law served by putting the costs of unlawful regulation on property owners. As Justice Brennan explained over two decades ago, a rule imposing invalidation as the penalty for improper land use controls provides too weak

a disincentive to deter regulatory encroachments on private property rights. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) ("Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity."). What is required are "the increased costs and the attendant political pressures inherent in the budgetary process" arising from takings judgments. *See* Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 Willamette L. Rev. 695, 715 (2000). Sheltering the government from these pressures and costs by placing them on the backs of innocent landowners sends a signal to zealous regulators that they do not have to show any particular concern for the lawfulness of their actions. *See San Diego Gas & Electric*, 450 U.S. at 655 n.22 (Brennan, J., dissenting); *Landgate*, 953 P.2d at 1210 (Brown, J., dissenting) (asserting that finding no taking despite unlawful action undermines government's duty to "turn square corners when it attempts to overregulate the use of private property").

To reinforce the rule of law and fairness in the land use context, the Court should grant the petition.

II

THE DECISION BELOW HIGHLIGHTS THE CONFLICT AND CONFUSION IN THE LOWER COURTS OVER THE MEANING AND APPLICATION OF THE SUBSTANTIAL ADVANCEMENT TEST

The lower courts have disagreed sharply over whether a litigant alleging a taking must show loss of all economically viable use in addition to proving that the government action fails to substantially advance a legitimate state interest. Several courts have held that invalidation is the exclusive remedy for an unlawful action unless the claimant also shows loss of all use, *Tampa-Hillsborough County Expressway Authority v. A.G.W.S.*

Corp., 640 So. 2d 54, 57 (Fla. 1994) (*A.G.W.S.*). Others have expressly held that substantial advancement is a distinct test that is, alone, sufficient to support a regulatory takings claim. *See, e.g.*, *State ex rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345, 350 (Ohio 2002) (*Shemo*).

The lower courts are also in disarray with respect to whether unlawful government action fails to substantially advance a legitimate state interest and several confusing and contradictory tests have been developed. *See, e.g.*, *Torromeo v. Town of Fremont*, 813 A.2d 389, 392 (N.H. 2002), *cert. denied*, 123 S. Ct. 2283 (2003) (holding that the application of an invalid regulation does not rise to the level of a compensable taking); *see also Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (finding no taking because the government action, though unlawful, "made a good deal of sense."); *but cf. Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 742 n.25 (Wis. 1999) (specifically rejecting the reasoning in *Landgate* and *Loewenstein*). There is further disagreement over whether bad faith is a proper requirement before a taking may be found. *See Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (requiring bad faith); *but cf. Allenfield Associates v. United States*, 40 Fed. Cl. 471, 487 (1998) (rejecting government intent as a factor). Thus, property owners subjected to unlawful government regulation unfairly face different standards for proving a takings claim depending on the jurisdiction in which their property sits.

A. State Supreme Court Decisions Conflict Over Whether Proof That the Government Action Failed to Substantially Advance a Legitimate State Interest Is Sufficient to Support a Taking or if the Litigant Must Also Show Deprivation of All Economically Viable Use

Some courts require that a property owner show that government action deprived him of all use before finding a taking. In *Torromeo v. Town of Fremont*, 813 A.2d 389, the

New Hampshire Supreme Court determined that a litigant must prove more than that the state failed to substantially advance a legitimate state interest. Though the court found that the government action was unlawful, it held that there was no taking. *Id.* at 392. Absent a showing of deprivation of economically viable use, invalidation is the only remedy in New Hampshire when a government restriction is "arbitrary or unreasonable." *Id.*

Florida courts have also determined that a taking may not be found without a showing that the landowner was deprived of "substantially all use" of property. *A.G.W.S.*, 640 So. 2d at 57. Though the court had earlier struck down the regulation because it was unconstitutional, it held that, when government acts "arbitrarily . . . the government action is simply invalid." *Id.* According to the Florida Supreme Court, a taking occurs only "where regulation denies substantially all economically beneficial or productive use of land." *Id.* at 58. Florida reaffirmed its commitment to this position as recently as 1998. *See Gardens Country Club, Inc. v. Palm Beach County*, 712 So. 2d 398, 401-02 (Fla. Dist. Ct. App. 1998) (quoting *A.G.W.S.* extensively and citing it approvingly).

Other courts have determined that denial of all economically viable use is not a prerequisite to a takings claim and that failure to substantially advance a legitimate state interest is a separate test altogether. *See, e.g.*, Stephen R. McCutcheon, Jr., Casenote: *Lessened Protection for Property Rights—The Conjunctive Application of the* Agins v. City of Tiburon *Disjunctive Test*, 27 Pac. L.J. 1657, 1681-82 (1996) (discussing decisions applying substantial advancement as an independent takings test). New York, for example, has held that a "law effects a regulatory taking if *either*: (1) 'the ordinance does not substantially advance legitimate state interests' *or* (2) the ordinance 'denies an owner economically viable use of his land.' " *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974 (N.Y. 1999) (emphasis

added) (quoting *Agins*, 447 U.S. at 260). This either/or approach supports a taking without a showing that the owner lost all use or value.

Ohio has also concluded that denial of economically viable use is not required and that substantial advancement is a separate takings claim. In *Shemo*, 765 N.E.2d at 350, the state supreme court used the same either/or approach in declaring that substantial advancement and loss of all use are distinct tests, either of which may support a taking. *See id.* There, both parties agreed that the regulation failed to substantially advance a legitimate state interest but the government argued that the plaintiff had to prove loss of use as well. *See id.* at 350-51. Chronicling the substantial disagreement over this subject, the court "clarified" its previous rulings and expressly held that "a compensable taking can occur *either* if the application of the zoning ordinance to the particular property . . . does not substantially advance legitimate state interests, *or* denies the landowner all economically viable use of the land." *Id.* at 350 (emphasis in original).

The decision below adopts the view that loss of all economically viable use is a "threshold requirement" that must be satisfied before proceeding to the substantial advancement portion of the test. Pet. App at Ex. A-23. In concluding that the School's failure to show loss of all economically viable use was a "preliminary problem with [its] inverse condemnation claim," *id.* at A-21, the court below is in square conflict with *Shemo* and *Bonnie Briar* but in substantial agreement with *A.G.W.S.* and *Torromeo*. This case presents this Court with an opportunity to clarify that a property owner may state a claim for a regulatory taking if the regulation violates either one of the tests set forth by this Court in *Agins*.

B. State and Federal Decisions Conflict over Whether and How an Unlawful Action May Substantially Advance a Legitimate State Interest

The lower courts are also in conflict over whether an unlawful action may substantially advance a legitimate state interest and under what circumstances it may do so. Some state courts have expressly stated that unlawful action may substantially advance a legitimate state interest, *see, e.g.*, *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1276 n.10 (Mass. 1992), while others have impliedly agreed, holding that an unlawful government action restricting property is, without more, insufficient to support a takings claim. *See Cannone v. Noey*, 867 P.2d 797 (Alaska 1994). Still others conclude that a government action which restricts property fails to substantially advance a legitimate state interest if it is unlawful or ultra vires. *See, e.g.*, *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d at 742 n.25. Courts also disagree over the role of government bad faith in a substantial advancement claim; some require proof of government bad faith before finding a taking, *see Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, while others reject government intent as a factor and, instead, focus on the effect of the action. *See, e.g.*, *Allenfield Associates v. United States*, 40 Fed. Cl. at 487.

In *Steinbergh*, the Massachusetts Supreme Judicial Court addressed a takings claim under the substantial advancement standard. 604 N.E.2d at 1275. A previous decision of the court determined that the government had no "authority to adopt" the ordinance that restricted the plaintiff's property and that it was therefore unlawful. *Id.* at 1276 (citing *Steinbergh v. Rent Control Board of Caimbridge*, 546 N.E.2d 169 (Mass. 1989)). Despite this holding, the court went on to find that the unlawful ordinance substantially advanced legitimate state interests, concluding that, "as a matter of law," an "ultra vires" act of the government may "be viewed for takings purposes as substantially advancing a state interest." *Id.* at 1276 n.10. The

court found no taking, holding that the unlawful action "substantially advanced the operation of the Cambridge rent control law." *Id.* at 1277.

The Supreme Court of Alaska has also found that an unlawful government action does not always support a taking claim. *See Cannone v. Noey*, 867 P.2d 797. The *Cannone* court reversed a trial court's finding of a regulatory taking despite the fact that the government action denying the use of property was "arbitrary and capricious." *Id.* at 801. Reasoning that "an arbitrary finding is not a substitute for the takings inquiry," the court remanded the case to the trial court, ordering it to conduct a separate takings evaluation. *Id.* The Alaska court thus implied that there are circumstances under which an arbitrary, unlawful government action could substantially advance a legitimate state interest.

California also took this approach in *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188. There, the state supreme court concluded that proof that the government action was unlawful was insufficient. *Id.* at 1190. The court found an unlawful government action did not form the basis of a taking because it "was 'supported by a plausible though [perhaps] erroneous legal argument' and therefore not the basis of a taking." *Id.* at 1200 (quoting *Littoral Development Co. v. San Francisco Bay Conservation and Development Comm'n*, 39 Cal. Rptr. 2d 266, 272 (Ct. App. 1995)).

Though it did reject the remarkable argument that "a government exercise of power that is beyond its jurisdictional authority can *never* be a taking," *id.* at 1201 n.7, the California Supreme Court nevertheless concluded that a litigant must prove that an unlawful action was "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." *Landgate*, 953 P.2d at 1199. The court went on to characterize

litigation over unlawful government action as a "normal delay" in the permitting process and found no taking. *Id.* at 1190.

Other courts have rejected this reasoning and have held that it is in conflict with the decisions of this Court. The Wisconsin Supreme Court, for example, expressly refused to accept the reasoning in *Landgate* and rejected its rule because it was "rejected by the United States Supreme Court." *Eberle*, 595 N.W.2d at 742 n.25. Relying heavily on several of this Court's decisions, the Wisconsin Supreme Court held that invalidation of an illegal action was not a sufficient remedy and indicated that an unlawful government action denying the use of property resulted in a taking. *Id.* at 742-43. The court could find no reason why "reversal of an agency action by a court converts an action which otherwise might have been actionable as a taking into one which is not." *Id.* at 742. For Wisconsin residents, therefore, an unlawful government action restricting the use of property results in a compensable taking.

The lower federal courts have also rejected bad faith as a requirement of a takings claim. In *Allenfield Associates v. United States*, 40 Fed. Cl. at 487, the court held that "a plaintiff need not prove the Government's intent to take the property" to succeed on a takings claim. The court in *Robinson v. Ariyoshi*, 441 F. Supp. 559, 585 (D. Haw. 1977) (*Ariyoshi*), also eschewed any intent requirement, finding a "retroactive taking of private property for and by the State." There, the federal district court for Hawaii found a taking by the state, *which was not a party to the litigation*, because the Hawaii Supreme Court declared that the state was the true owner of the property.[3] *See*

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[3] After the opinion cited in the above text, *Ariyoshi* embarked on a fourteen year journey through the federal courts. The Ninth Circuit affirmed the opinion in relevant part in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1475 (9th Cir. 1985). Though the opinion was later vacated and the claim held unripe in light of this Court's decision in

(continued...)

id. The district court found a taking because the "Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result." *Id.*

In line with California decisions on this subject, the court below found that the Commission's unlawful action did not rise to the level of a taking in this case because its action was not based on "a completely untenable legal position." Pet. App. at Ex. A-24. Though it agreed with the trial court that the Commission's action was unlawful, the court of appeal merely invalidated the permit denial because the denial, though unlawful, still substantially advanced a legitimate state interest. *Id.* The decision below, therefore, determines both that an unlawful action may substantially advance a legitimate state interest and that evidence of bad faith is required to establish a taking.

In deciding that an unlawful government action may substantially advance â legitimate state interest, the decision below adopts the logic in *Landgate*, *Steinbergh*, and *Cannone* but is in square conflict with *Eberle*. In requiring proof of bad faith, the decision below highlights the conflict over whether bad faith is a required element of a takings claim. *See Allenfield*, 40 Fed. Cl. at 487; *but cf. Landgate*, 953 P.2d at 1200. This Court should grant the Petition to end the confusion over whether illegal government action may substantially advance a legitimate state interest and resolve the contradiction

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[3] (...continued)
Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), it is important to note that the method of analysis was never challenged and that the case was ultimately decided on procedural grounds. *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir. 1989). For a further explanation of the history of this case, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438 (1996).

in the lower courts over the role of bad faith in a substantial advancement claim.

III

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDINGS ON REGULATORY TAKINGS

The decision below conflicts with the seminal Takings decisions of this Court. First, it incorrectly holds that loss of all economically viable use is a "threshold requirement" for a substantial advancement claim in conflict with *Agins*, 447 U.S. at 260, and its progeny. Second, it concludes that unlawful government action may substantially advance a legitimate state interest in conflict with this Court's holdings in *Del Monte Dunes*, 526 U.S. at 722, and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). Finally, the decision below also requires a showing of bad faith despite the fact that this Court has repeatedly characterized bad faith and substantial advancement as separate takings tests. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 333. Thus, the decision below is in sharp conflict with this Court's instruction on regulatory takings.

A. The Decision Below Conflicts with This Court's Takings Jurisprudence by Requiring a Showing of Loss of All Economically Viable Use and Failure to Substantially Advance Legitimate State Interests Before Finding a Taking

In 1980, this Court declared that a government action effects a taking

> if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), *or* denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New*

> *York City*, 438 U.S. 104, 138, n. 36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631 (1978).

Agins, 447 U.S. at 260 (emphasis added). In the two decades since this decision, this Court has repeatedly confirmed that these are distinct regulatory takings tests, each of which is sufficient to support a taking. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 333-35; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 704, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016; *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 126. In these decisions, this Court "repeatedly stated that a regulation of land use constitutes a taking 'if the ordinance does not substantially advance legitimate state interests.'" Ziegler, 34 Urb. Law. at 158 (citation omitted).

These decisions uniformly hold that failure to substantially advance a legitimate state interest and loss of all economic use are two independent tests, each of which supports a takings claim. The decision of the court below, holding that both tests must be met, flatly contradicts this Court's holdings.

B. The Decision Below Conflicts with This Court's Decisions by Holding That Unlawful Action May Substantially Advance Legitimate State Interests

As noted, the rule that a government regulation that fails to substantially advance a legitimate state interest results in a taking is well established in this Court's precedent. *See Agins*, 447 U.S. at 260 (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)). This Court recently reaffirmed this principal in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 701, when it upheld jury instructions finding a taking "if the preponderance of the evidence establishe[d] that

there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose." Significantly, this Court upheld the trial court's decision in *Del Monte Dunes* to submit the disputed question of whether the government caused a taking when it "denied a constitutional right in *acting outside the bounds of its authority*," thus implying that a takings litigant need only prove that he has been denied the use of his property by unlawful government action. *Id.* at 722 (emphasis added).

The decision below also improperly places all of its focus on the Commission's goal, rather than also examining the means used to advance that interest as the substantial advancement test requires. *See* Kmiec, 88 Colum. L. Rev. at 1649 (noting that "heightened intermediate scrutiny of means" is required in a substantial advancement inquiry.). In *Nollan v. California Coastal Comm'n*, 482 U.S. at 834, this Court explained that the substantial advancement test required a stricter scrutiny of the means employed to advance the government's stated end. *Id. See also* Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence*, 7 CommLaw Conspectus 119, 127 (1999) ("*Dolan*, *Lucas* and *Nollan* establish a higher degree of Takings Clause scrutiny than in previous Supreme Court cases."). In failing to consider the unlawfulness of the government's action, the court below improperly ignored this Court's direction to scrutinize the means by which the Commission sought to achieve its ends.

C. The Decision Below Conflicts with This Court's Rulings on the Proper Role of Bad Faith in a Regulatory Takings Inquiry

The decision below conflicts with this Court's decisions by requiring proof of government bad faith to establish a takings claim. Though this Court has recognized that bad faith may constitute a separate takings claim, no Justice has ever suggested that bad faith is a required element of a takings claim.

See Brownstein, 13 Const. Comment. at 16 ("Indeed, even very liberal Justices on the Supreme Court have made it clear that any attempt to restrict the scope of the Takings Clause to the deliberately intended confiscation of property rights is unacceptable.").

In *Del Monte Dunes*, this Court recognized that bad faith is not a required element of a substantial advancement inquiry, approving jury instructions ordering that the City's "underlying motives and reasons are not to be inquired into." 526 U.S. at 701. The Court found that the instructions were "consistent with our previous general discussions of regulatory takings liability." *Id.* at 704 (citing *Agins*, 447 U.S. at 260).

Justice Brennan rejected intent as a requirement for a regulatory takings claim shortly after the *Agins* decision. In *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. at 633, this Court dismissed a takings claim on ripeness grounds and failed to reach the merits of the decision, but Justice Brennan dissented and discussed the merits of the takings claim at length. *Id.* at 636-61. In finding a taking, Justice Brennan stressed that intent is not the lodestar in analyzing a takings claim. *Id.* at 652-53. It "matter[s] little" to the property owner whether the government intended to take his land if the practical effect was that he could no longer use it himself. *Id.* at 652. There is broad agreement that this Court later adopted Justice Brennan's *San Diego Gas and Electric* reasoning in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 n.9 (1987). Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 Cath. U. L. Rev. 817, 827 (1993) (noting that the *First English* Court "essentially adopted the reasoning of Justice Brennan's more eloquent argument in favor of compensation in *San Diego Gas & Electric Co.*"); *see also* Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 Pace Envtl. L. Rev. 619, 627 (2002) (noting that Justice Brennan authored the "dissent in *San*

Diego Gas & Electric v. City of San Diego, which subsequently became the Court's holding in *First English Evangelical Church v. County of Los Angeles*") (footnote omitted).

Finally, the decision below conflicts with this Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, which this Court concluded that a taking could be found "based on any of seven different theories." *Id.* at 333. In listing all seven, the Court noted that it might have found a taking by "[f]ifth, . . . we might have concluded that the agency was stalling" but that such a finding was precluded because the district court found that the agency had "acted diligently and in good faith." *Id.* The Court continued the list "Sixth, . . . petitioners might have argued that the [government action at issue] did not substantially advance a legitimate state interest." *Id.* at 334. This is a clear indication that "bad faith" or intent to delay is a different theory than substantial advancement, either of which are sufficient to find a taking under these "different theories." *Id.* at 333.

The decision below, though, requires a litigant to prove bad faith as a precondition to recovery under a substantial advancement theory. So long as the government is not seeking "only to delay or discourage development," there is no taking. Pet. App. at Ex. A-20. This ruling both conflicts with this Court's decisions and appreciably raises the bar for a claimant who has been the victim of an unlawful government action. Finally, the decision below undermines important checks on government action in the land use process. Without this check to "limit[] government and maximiz[e] individual liberty," land use planning agencies are encouraged to press the limits of their authority and encroach ever more on the rights of private property owners. *Landgate*, 953 P.2d at 1207 (Brown, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and reverse the decision of the court below.

DATED: November, 2003.

Respectfully submitted,

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Appendix A–1

Filed 5/8/03

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ENCINITAS COUNTRY DAY SCHOOL, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Appellant; SAN ELIJO LAGOON CONSERVANCY, Real Party in Interest and Appellant.	D038323 (Super. Ct. No. 729619)

[1] Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III, IV.

ENCINITAS COUNTRY DAY SCHOOL, INC., et al., Plaintiffs and Respondents, v. CALIFORNIA COASTAL COMMISSION, Defendant; SAN ELIJO LAGOON CONSERVANCY, Real Party in Interest and Appellant.	D040300 (Super. Ct. No. 729619)

APPEALS from a judgment and an order of the Superior Court of San Diego County, Linda B. Quinn, Thomas O. LaVoy, Judges. Judgment affirmed; order reversed and remanded.

Lewis, D'Amato, Brisbois & Bisgaard, Lewis Brisbois Bisgaard & Smith, Martin J. Mullen, Jeffry A. Miller; Law Offices of Michael T. Larsen, Michael T. Larsen; Howard, Rice, Nemerovski, Canady, Falk & Rabkin and Richard C. Jacobs for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodriquez, Assistant Attorney General and G.R. Overton, Deputy Attorney General for Defendant and Appellant.

Johnson & Edwards, Johnson & Cross, Kevin K. Johnson and Jared Phil Hanson for Real Party in Interest and Appellant.

In the published portion of this opinion, we address the appeal by the California Coastal Commission (Commission) and the San Elijo Lagoon Conservancy (Conservancy) of the trial court's issuance of a writ holding the Commission's denial of a permit was invalid because the Commission failed to timely rule within the 49-day jurisdictional period of Public Resources Code section 30625[2] whether a "substantial issue" existed such that the Commission should hear the appeal of the permit.[3] We hold the Commission's action in this case of merely opening the hearing within the 49-day period and continuing the matter beyond the 49-day period failed to comply with section 30625. The Commission was required to determine within the 49-day period whether a substantial issue existed, including whether the project was within the geographical boundaries of the Commission's appellate jurisdiction. We therefore affirm the issuance of the writ.

In the unpublished portion of this opinion, we find it unnecessary to reach the question of whether the project was within the Commission's geographic appellate jurisdiction on the basis the project was located between the first public road (Manchester Avenue) and the sea (San Elijo Lagoon) due to our conclusion the Commission lost jurisdiction by failing to determine the substantial issue question within the 49-day jurisdictional period. We also reject the appeal by the project's proponents—Encinitas Country Day School, Inc. (ECDS), Kathleen Porterfield, and M&M Development Corporation

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[2] All statutory references are to the Public Resources Code unless otherwise specified.

[3] Section 30625, subdivision (b) provides, in pertinent part: "The commission shall hear an appeal unless it determines the following: [¶] (1) With respect to appeals pursuant to subdivision (a) of Section 30602, that no substantial issue exists as to conformity with Chapter 3 (commencing with Section 30200)."

(hereafter collectively referred to as ECDS)[4]—of their inverse condemnation claim on the basis ECDS failed to establish the denial of the permit had resulted in a loss of all economically viable use of the property or that the inverse condemnation claim was ripe for adjudication. We thus affirm the judgment.

Additionally, in the unpublished portion, we reverse the Conservancy's appeal of the trial court's postjudgment order partially lifting a stay of the judgment on appeal on the basis the appeal is moot and we remand to the trial court to dismiss ECDS's motion to lift the stay.[5]

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, ECDS sought approval from the City of Encinitas (the City) to build a 432-student elementary school on a 20-acre parcel of undeveloped property located on Manchester Avenue southeast of the intersection of Manchester Avenue and El Camino Real in the City. The property is located between Manchester Avenue and San Elijo Lagoon. Between the project site and the lagoon is an undeveloped parcel of land. The project site lies to the east of the Pacific Ocean. Between the project site and the Pacific Ocean are Highway 101 and, further east, Interstate 5.

Because the property was located within the City's local coastal plan, ECDS was required to obtain a coastal development permit from the City. In September 1998, after

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[4] Kathleen Porterfield is the director and representative of ECDS. M&M Development Corporation is a limited liability corporation that owns the underlying property, and has entered into an agreement for a 99-year lease with ECDS.

[5] The postjudgment stay was raised in the appeal, *Encinitas Country Day School, Inc. v. San Elijo Lagoon Conservancy* (D040300). We ordered that appeal consolidated with *Encinitas Country Day School, Inc. v. California Coastal Commission* (D038323) which raised the jurisdictional and inverse condemnation issues.

circulation of a mitigated negative declaration on the proposed project's environmental impacts and after a public hearing, the City's planning commission approved the project with conditions. The approval was appealed to the City council. Following a public hearing in November 1998, the City council approved the project with conditions.

The City's approval was appealed to the Commission on the basis that substantial issues existed as to the project's conformity with the City's local coastal plan. The appeals were received by the Commission on December 10, 1998. On December 14, 1998, the Commission published a notice stating the matter would be considered at the Commission's January 1999 meeting and notified the parties they were required to deliver copies of all relevant documents to the Commission's San Diego office within five working days of receiving the notification of appeal. By December 17, 1998, the City had transmitted to the Commission the last remaining files in the case. The City had already sent to the Commission the administrative record with all exhibits for the City council's November 1998 hearing, the resolution approving the project, the certified environmental assessment, and the project plans. The documents received on December 17, 1998, consisted of the United States Fish and Wildlife Service/California Department of Fish and Game approvals of "4(d) permit issuance" (i.e., a permit to allow ECDS to purchase endangered species habitat land to make up for loss of such habitat by its project), the public notification list, hearing speaker slips, and legal notifications for the planning commission and city council hearings.

On December 17, 1998, the Commission staff (the staff) issued a report noting that a hearing was required to be set within 49 days of the date of appeal, stating that it had not yet received all relevant documents from the City, and recommending the Commission open and continue the matter at its January 1999 meeting.

The Commission met on January 13, 1999, at which time the Commission opened the ECDS matter and continued it to its February 1999 meeting without considering any issues, including whether a substantial issue existed, the scope of its appellate jurisdiction, or the merits of the appeals.

In January 1999, the staff prepared a report recommending that a substantial issue be found as to whether the project complied with the City's local coastal plan and therefore the appeals should be heard. The report stated the Commission had appellate jurisdiction over the project because the project was located between the first public road (Manchester Avenue) and the sea (San Elijo Lagoon). (See Cal. Code Regs., tit. 14, § 13577.) Prior to this determination of appellate jurisdiction, and prior to the actual receipt of the appeals, the staff believed that the Commission's appellate jurisdiction would be limited to 100 feet from wetlands.

The staff report noted that the development of the school pursuant to a major use permit would result in seven times more traffic than if the property were developed under the current rural residential zoning that allowed up to ten residences. The staff report recommended denying the coastal development permit because the City had failed to consider the impact of the increased traffic on the Interstate 5 and Manchester Avenue interchange and how the increased traffic would add pressure to widen Manchester Avenue and the Interstate 5/Manchester Avenue interchange southward toward the San Elijo Lagoon. Such widening conflicted with the City's local coastal plan of avoiding widening Manchester Avenue or the Manchester Avenue/Interstate 5 interchange on the south, lagoon side. The staff also noted that the City had failed to consider the cumulative impact of the ECDS project given other developments approved through the major use permit process along the Manchester Avenue corridor. These approvals had resulted in a greater intensity of development than what was called for in the City's certified local coastal plan.

Additionally, the staff recommended denial because the City had failed to consider other alternatives to the project and to filling wetlands for an expansion of Manchester Avenue as part of the project. The staff noted that the filling of the wetlands conflicted with the City's local coastal plan policies of protecting wetlands.

At the Commission's meeting on February 4, 1999, 56 days aller the appeals were filed, the Commission adopted the staff's recommendations and denied approval of the project.

ECDS moved for reconsideration on the basis that Manchester Avenue was not the first public road from the sea. ECDS argued that prior to the designation in this case of Manchester Avenue as the first public road from the sea, the Commission had never asserted jurisdiction on this basis.[6] Nor had the Commission or the City previously drafted or adopted a map showing Manchester Avenue as the first public road from the sea. Instead, the Commission's mapping unit had created a map showing Highway 101 as the first public road from the sea (the Pacific Ocean). This map had never been certified but had been used by the City for about 20 years.[7] Disputed evidence

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[6] The Commission asserts that Manchester Avenue had been recognized as the first public road from the sea in its approval of other projects in the area. The record does not support this contention. The record shows that jurisdiction in the other projects was asserted because development was occurring in the flood plain or on wetlands.

[7] California Code of Regulations, title 14, section 13576, subdivision (a) provides: "In conjunction with final Local Coastal Program certification or the delegation of coastal development permit authority pursuant to Public Resources Code Section 30600.5, whichever occurs first, the Commission shall, after public hearing, adopt a map or maps of the coastal zone of the affected jurisdiction that portrays the areas where the Commission retains permit

(continued...)

was submitted to the Commission as to whether San Elijo Lagoon was an arm of the sea east of Interstate 5 where the ECDS property is located, e.g., whether it was subject to tidal action.[8] The Commission denied ECDS's motion for reconsideration at its May 1999 meeting.

In June 1999, ECDS filed a first amended petition for writ of mandate and complaint for a preliminary and permanent injunction, declaratory relief, and for inverse condemnation. The petition and the complaint were bifurcated, with the petition proceeding first before Judge Quinn.

Judge Quinn granted the writ of mandate and ordered that Commission's denial of the coastal development permit be set

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[7] (...continued)
authority pursuant to Public Resources Code Sections 30603[, [subdivision] (a)(1) and (a)(2), or 30600.5[, subdivision] (d). These maps shall be drawn based on the criteria for permit and appeal boundary determinations, set forth in [California Code of Regulations, title 14, s]ection 13577 . . . , and will serve as the official maps of the Commission's permit and appeal jurisdiction. The Commission, in consultation with the local government, shall update these maps from time to time, where changes occur in the conditions on which the adopted maps were based, or where it can be shown that the location of the mapped boundary does not adequately reflect the intended boundary criteria. Revisions of the adopted maps shall be based on precise boundary determinations made using the criteria set forth in [California Code of Regulations, title 14, s]ection 13577. The revised maps shall be filed with the affected jurisdiction within 30 days of adoption by the Commission . . . ." (Bold type omitted.)

Note that all further references to the California Code of Regulations are to title 14 unless otherwise specified.

[8] Note that the Commission's decision to deny reconsideration was not based on a resolution of conflicting evidence as to whether San Elijo Lagoon was part of the sea, but on whether ECDS should have pursued this issue at the February hearing.

aside and the City's approval of ECDS's coastal development permit be final. The court ruled the Commission's denial of the permit was invalid because the Commission had failed to timely rule within the 49-day jurisdictional period of section 30625 and ECDS had not waived the 49-day limit. The court rejected the Commission's argument that it met the 49-day jurisdictional time limit by scheduling a hearing within the 49-day period; the court ruled that the Commission was required within the 49-day jurisdictional period to resolve, at a minimum, the question of whether there was a substantial issue as to the project so as to merit the Commission hearing the appeals.

The trial judge also ruled that the Commission's finding that it had appellate jurisdiction over the development on the basis Manchester Avenue was the first public road from the sea was not supported by substantial evidence. She noted the Commission had never before indicated Manchester Avenue was the first public road from the sea; "[t]o the contrary, all documents that existed and the uniform practice of the Commission reflect that the Commission acquiesced to the proposition that Old Highway 101 was the first public road as shown on the draft map of the area prepared by the Commission's Mapping Unit." Judge Quinn concluded it was improper for the Commission to assert Manchester Avenue was the first public road from the sea at a time when its "Mapping Unit had not even issued such an opinion or 'draft' map" showing Manchester Avenue as the first public road from the sea.

The inverse condemnation matter was heard before Judge LaVoy. Judge LaVoy ruled that although the Commission was wrong in its determination that it had complied with the 49-day jurisdictional limit, the Commission's position was not unreasonable "to the extent that perhaps some rational attorney could believe that the arguments being pursued had merit." He also stated the Commission's actions at the February 4, 1999 and May 12, 1999 hearings were not so arbitrary and

unreasonable "'as to lead to the conclusion that they were taken for no purpose other than to delay the development project before it.'" (Quoting *Landgate, Inc. v. California Coastal Com'n.* (1998) 17 Cal.4th 1006, 1024 (*Landgate*).) Judge LaVoy, however, found the staff acted arbitrarily and unreasonably in asserting appellate jurisdiction based on Manchester Avenue being the first public road from the sea. The trial court noted that the Commission had not previously designated Manchester Avenue as the first public road from the sea; that "[a]s early as 1981 and at each subsequent remapping in 1988 and 1995, the . . . Commission itself consciously adopted Highway 101 as the first public road"; that since 1981, the draft map showing Highway 101 as the first public road from the sea had been relied upon by the public, the City, and the Commission; and that ECDS was "entitled to rely upon, and did rely upon, the repeated public statements of the Commission and the staff with regard to the limited appellate jurisdiction of the Commission [i.e., based on the presence of wetlands on the property]." Judge LaVoy also noted that the staff, relied "on the fact that[,] since 1981, the word 'draft' on the map allowed it to arbitrarily change the jurisdictional lines on the map whenever it decided to do so" thereby "completely bypassing [California Code of] Regulation[s, section] 13576 [detailing procedures for the adoption of jurisdictional maps]." The court found it difficult "to think of a more unreasonable and arbitrary position" than that adopted by the staff, and concluded that many of the staff's reasons "for its actions were pretextual, and that the staff's actions were in fact taken for no purpose other than to delay the project."

Nonetheless, Judge LaVoy determined that the Commission was "not bound by the acts of its staff members" and concluded "based on the legal conclusion that the acts of the staff may not be attributed to the Commission . . . , the extraordinarily high standard for determining that error by the Commission constitutes a regulatory-delay 'taking,'" an award

of damages for inverse condemnation against the Commission was precluded. Judge LaVoy also stated that ECDS had "been denied sufficient economic use of the subject property based on the limited facts of this case, such that the Commission's actions would have constituted a taking if this Court had not found that the legal arguments advanced in support of the Commission's erroneous conclusions were not completely unreasonable from a legal standpoint."

DISCUSSION

I

49-day Jurisdictional Rule

The Commission contends the trial court erred in finding the Commission lost jurisdiction when it merely opened and continued the hearing on the ECDS appeals within the 49-day jurisdictional period and did not consider whether the appeals involved a substantial issue, the scope of its appellate jurisdiction, and did not reach the merits of the appeals until 56 days after the appeals were filed.[9]

Section 30621, subdivision (a) provides that "[a] hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission." if the Commission fails to approve, modify or deny a proposed development "and if no action is taken within the time limit specified in Section[] 30621 . . . , the decision of the local government . . . shall become final, tmless the time limit in Section 30621 . . . is waived by the applicant." (§ 30625,

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[9] The Commission contends that ECDS waived the time period. We disagree. The record shows that prior to the Commission's January meeting, ECDS wrote to the Commission, objecting to the Commission not deciding the substantial issue question at its January meeting. ECDS also requested to speak at the January meeting but was not allowed to do so.

subd. (a).) This short time limit is "designed to avoid unnecessary bureaucratic delay." (*Coronado Yacht Club v. California Coastal Com.* (1993) 13 Cal.App.4th 860, 871 (*Coronado Yacht Club*).)

Here, the Commission, relying on our decision in *Coronado Yacht Club*, *supra*, 13 Cal.App.4th 860, interpreted the 49-day rule as being satisfied so long as it opened and continued the hearing within 49 days of the appeals being filed. Not only did the *Coronado Yacht Club* case not so hold, the case is also clearly distinguishable. In *Coronado Yacht Club* the issue was whether the Commission complied with the 49-day rule when the Commission during the 49-day period decided whether the appeal raised a substantial issue and therefore should be heard (see § 30625, subd. (b)) but continued the hearing on the merits of the appeal to a date beyond the 49-day period. We found reasonable the Commission's interpretation of the statute's requirement that a hearing "'set' to mean to be 'held' within 49 days of the filing of the appeal, rather than merely being 'scheduled.'" (*Id.* at p. 871.) "[M]indful [that] the statutory scheme provides for but one public hearing on an appeal," we held that "the Commission's administrative construction is reasonable, that it need only to open the hearing and if three commissioners desire a debate on the question of substantial issue, it need only resolve the matter of its jurisdiction and then continue the matter in a timely fashion that will guarantee its timely action on the appeal consistent with the implied legislative intent to avoid bureaucratic delay." (*Ibid.*) We observed that "[t]o require the Commission to debate and vote on whether the appeal raises a substantial issue sufficient to consider the merits of the permit application de novo but prohibit it from continuirqg the matter beyond the 49-day limitation in order to obtain full briefing from its staff and permit meaningful oral argument and testimony from the parties would improvidently promote form over substance." (*Ibid.*) In the course of our

discussion, we also noted that "[a]rguably, the Commission could have interpreted section 30621 to simply require it to 'schedule' or 'calendar' the hearing within 49 days after the filing of the appeal, but not commence it within that time period," but noted the Commission had not done that either in its regulations or in the particular proceeding and that such an interpretation would not be consistent with the legislative intent of avoiding bureaucratic delay. (*Ibid.*)

Thus, contrary to the Commission's argument, the *Coronado Yacht Club* case does not support its position that it is sufficient only to "calendar" or "open" a case within 49 days of the filing of the appeal but not begin to consider any issues relating to the case. In *Coronado Yacht Club* we approved of a procedure where the Commission decided, at a minimum, whether it had jurisdiction within the 49-day period and specifically observed that a procedure like the one used here would be inconsistent with the Legislature's intent. We make it plain here: the Commission is required, at a minimum, to make the determination whether a substantial issue exists, i.e., whether the appeal raises a substantial issue meriting an appellate hearing, within the 49-day limitation period.

This substantial issue determination necessarily includes a determination whether the project lies within the jurisdictional boundaries of the Commission's appellate jurisdiction. If the project does not lie within the geographical boundaries of the Commission's jurisdiction, obviously the case involves no substantial issue meriting the Commission's hearing the appeal. Thus, in this ease, the question whether the ECDS project was within the Commission's appellate jurisdiction because it was located between the first public road and the sea was required to be addressed at the January hearing.

The Commission also argues that merely scheduling a hearing within 49 days was appropriate in this case because the Commission did not receive all the relevant materials from the

City with sufficient time to permit it to determine whether there was a substantial issue. (See Cal. Code Regs., § 13112.)[10] The record shows that on December 17, 1998, the staff recommended the matter be merely scheduled for the January meeting and be heard at a later date because, at the time the staff recommendation was written, the staff did not have all of the City's permit files. At the January 13, 1999 meeting, the staff testified they had received only a portion of the file from the City. The record, however, shows that prior to the preparation of the report, the City had delivered to the Commission the bulk of the record. As of December 17, 1998, the City had delivered the last remaining files which consisted of a few minor documents, i.e., notifications for the planning commission and city council hearings, speaker slips for the city council hearing, and approvals from the state and federal offices of wildlife agencies relating to issuance of a "4(d) permit." All of the documents were delivered, as required, within five working days of the notice of appeals, which had been filed on Thursday, December 10, 1998.

While it may be true, as the Commission argues, that the staff may have prepared its report early on December 17, 1998, prior to the delivery of the last batch of documents from the City, this argument ignores the fact that the record reflects that the bulk of the documents and all the key documents had been delivered to the Commission's office prior to December 17. At

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[10] California Code of Regulations, section 13112, subdivision (a), in pertinent part, provides: ". . . Upon receipt of a Notice of Appeal the local government shall refrain from issuing a development permit for the proposed development and shall, within five (5) working days, deliver to the executive director all relevant documents and materials used by the local government in its consideration of the coastal development permit application *if the Commission fails to receive the documents and materials, the Commission shall set the matter for hearing and the hearing shall be left open until all relevant materials are received.*" (Italics added.)

best, the staff report was misleading when it indicated that "all relevant documents and materials regarding the subject permit" had not been received; while all documents may not have been received, all the relevant documents were in the staff's possession. Moreover, even if the staff report was technically tree in that *all* the documents had not been received as of the time the staff wrote the report, it does not excuse the staff from essentially imposing a cut-off date of December 16 a mere two days after the notification of the appeals and the request for documents was sent to the City. Nor does it excuse the staff from updating its report and recommendation upon the timely receipt of the last of the materials by the end of business on December 17, within hours after the staff report was written.

The Conservancy contends the Commission meets only once per month and, depending on the timing of the filing of an appeal, it may be extremely difficult for the staff to review an appeal, particularly if the record is long (here, 1,500 pages), as well as to make a full report within the 49-day period. Therefore, it is argued, [Public Resources Code] section 30621 must be construed as allowing the Commission to merely schedule a hearing within the 49-day period. As noted above, such a position is inconsistent with the legislative intent that bureaucratic delay be avoided. Further, the Commission points to nothing in the statutes or regulations that would preclude the staff, if its time were restricted by the timing of the appeals, from preparing an abbreviated report focusing on the more limited substantial issue question. (See Cal. Code Regs., § 13115, subd. (a) ["At the meeting next following the filing of an appeal with the Commission or as soon thereafter as practical, the executive director shall make a recommendation to the commission as to whether the appeal raises a significant question within the meaning of [Public Resources Code section 30625, subdivision (b)]"].) Nor does the record in this case present the difficult situation suggested by the Commission and the Conservancy.

The Conservancy argues that requiring the Commission to decide, at a minimum, the substantial issue question within the 49-day period will result in denying "the public and interested parties the benefit of 'weeding out' a substantial number of cases." We find this argument unpersuasive. Nothing in this record nor as a matter of common sense suggests that the process of weeding out unmeritorious cases would be eliminated by enforcing a requirement that the commission, at a minimum, determine the substantial issue matter within the 49-day period; the process of screening out unmeritorious cases does not requke an exhaustive, unduly time-consuming review of the administrative record nor preparation of a detailed report.

In sum, we conclude the Commission lost jurisdiction to hear the appeals when it failed, at a minimum, to decide the substantial issue question including whether the project was within the geographical boundaries of its appellate jurisdiction within the 49-day jurisdictional period.

II

Appellate Jurisdiction

First Public Road from the Sea or Presence of Wetlands

The parties dispute whether the Commission had appellate jurisdiction either on the basis that the development was located between the first public road and the sea or on the basis the property included wetlands. We need not decide these issues since regardless of whether the Commission might have appellate jurisdiction, the commission lost jurisdiction to hear the appeals by failing to act within the 49-day jurisdictional time period.

III

Inverse Condemnation

ECDS contends the trial court erred in finding that it was not entitled to inverse condemnation damages based on a temporary taking due to the staff's arbitrary and capricious conduct in first asserting jurisdiction based on the presence of wetlands and only later arbitrarily asserting jurisdiction based on Manchester Avenue as the first public road from the sea.[11]

To prevail on a claim for inverse condemnation based on a temporary regulatory taking, it is necessary to show, as ECDS states in its brief, that "a governmental regulation [denial of a permit, or assertion of jurisdiction] deprives a landowner of *all economically viable use of his land* without just compensation." (Italics added.) (See *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 312-313; *Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250.) When the government regulates land or denies a permit to develop land so that the landowner has no economically viable use of the land, essentially, the land has been taken for the benefit of the public at large and under the Fifth Amendment of the United States Constitution, the landowner must be compensated for the loss

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[11] ECDS also contends the court erred in finding the staff's conduct could not be attributed to the Commission. We agree with ECDS to the extent that the Commission adopted the position of the staff, i.e., by adopting the staff's position that the Commission had appellate jurisdiction because Manchester Avenue was the first public road from the sea, the Commission made that position its own. This situation contrasts with the cases cited by the trial court where individuals claimed they were entitled to rely on legal opinions offered by a city staff member. (See e.g., *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1444, 1449-1450 [misleading legal advice by a planning commissioner as to how to appeal a planning commission decision]. Here, in contrast, ECDS is challenging the assertion of jurisdiction by the Commission itself.

of his land; the burden should be on the taxpayers, rather than the individual landowner. (*First Lutheran Church v. Los Angeles County*, *supra*, 482 U.S. 304, 318-319 ["[T]he Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'"].) "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*Id.* at p. 321; *Ali v. City of Los Angeles*, *supra*, 77 Cal.App.4th at p. 251.) Thus, the government may be required to pay just compensation even when the taking was only temporary.

"The mere assertion of regulatory jurisdiction by a governmental body does not constitute a taking. [Citation.] The requirement that a person obtain a permit before engaging in a certain use of the property does not itself take the property; the very existence of a permit system implies that permission may be granted to allow the owner to use the property as desired. Even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred." (*Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 192-193.) "[A] rational permit regulation scheme is imposed on the public as a whole to ensure the orderly development of real property, [and] benefit[s] as well as burden[s] property owners." (*Landgate*, *supra*, 17 Cal.4th at p. 1018.) These restrictions on development may lessen the value or economic use of the property but they do not require the payment of compensation; reasonable restrictions on development are to be borne by the individual landowners rather than the taxpayers. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 ["Government hardly could

go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"]; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 627.) These concepts remain true whether the government restriction or denial of a permit is permanent or temporary. (See *Palazzolo v. Rhode Island*, *supra*, at pp. 625, 627, 631.)

Merely because conduct by a governmental agency has delayed development due to, for example, an erroneous assertion of jurisdiction and denial of a development permit, does not mean the governmental agency is liable for a temporary taking. (See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 335 ["A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking"].) As explained by our Supreme Court in *Landgate*, *supra*, 17 Cal.4th at page 1020, "an error by a governmental agency in the development approval process does not necessarily amount to a taking even if the error in some way diminishes the value of the subject property . . . ." Only if the governmental agency's position does not advance a legitimate state interest but represents a position "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project," will a taking be found. (*Id.* at p. 1024.) The action taken by the governmental agency must be arbitrary and capricious; a governmental agency may not "arbitrarily impos[e] conditions on development in order to delay or discourage that development"—"[t]he government agency's assertion of authority, whether or not erroneous, must advance some legitimate government purpose." (*Id.* at p. 1029.)

The fact that an impasse in the regulatory process must be resolved through a judicial proceeding does not necessarily establish that there was "a temporary taking rather than a normal delay in development." (*Landgate*, *supra*, 17 Cal.4th at

p. 1030.) "[A] judicial determination of the validity of certain preconditions to development is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking." (*Ibid.*, italics omitted.) When there is a bona fide dispute over whether a governmental agency has authority to assert jurisdiction and deny a permit (i.e., when the governmental agency is proceeding from a legally tenable position rather than acting arbitrarily and capriciously without a legitimate basis and seeking only to delay or discourage development), "[s]uch delay is an incident of property ownership and not a taking of property." (*Id.* at p. 1031.) The *Landgate* court explained, "the mistaken assertion of jurisdiction over a development is part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution." (*Id.* at p. 1021, fn. omitted; *Loewenstein v. City of Lafayette* (2002) 103 Cal.App.4th 718, 733; *Ali v. City of Los Angeles*, *supra*, 77 Cal.App.4th 246, 251.)

The cases have also explained that a takings claim is not ripe until there has been a final adjudication by the government defining the scope of the permitted development on the property. (See *Palazzolo v. Rhode Island.*, *supra*, 533 U.S. at p. 620; see also *Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal. App.4th 10, 19 ["It appears the case is ripe for adjudication because the City has identified definitively the uses it will permit for the property"].) "Under our ripeness roles a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.

As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established." (*Palazzolo v. Rhode Island*, *supra*, 533 U.S. at pp. 620-621.)

Here, we have a claim that the Commission wrongfully asserted jurisdiction over the ECDS development on the basis the property was located between the first public road and the sea. ECDS's claim focuses on the reasonableness of the staff in originally assessing jurisdiction based on a different, more limited basis (the presence of wetlands in a part of the property that was not being developed), and in rejecting a map, long used but never certified, which showed Highway 101, rather than Manchester Avenue, as being the first public road from the sea. ECDS does not challenge the sufficiency of the evidence to support the Commission's reasons for ultimately denying the permit (e.g., the inadequacy of the City's analysis of traffic impacts).[12] Nor does ECDS, in its briefs on appeal, argue that, if proper procedures were followed, it would be arbitrary or capricious to adopt Manchester Avenue as the first public road from the sea.

The preliminary problem with ECDS's inverse condemnation claim is that although ECDS specifically acknowledges that a compensable taking occurs only if the government's actions result in a denial of *all* economically viable use of the land (albeit temporarily), ECDS almost entirely ignores this issue and instead focuses on whether the

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[12] ECDS does challenge the Commission's ability to review environmental issues pursuant to the California Environmental Quality Act, arguing that the Commission was required to timely appeal from the City's adoption of the mitigated negative declaration. We need not address that issue here. We only note that ECDS does not claim that the Commission's basis for denial of the permit (e.g., the inadequacy of the traffic analysis) was unreasonable or unsupported by the evidence.

Commission acted arbitrarily and capriciously in asserting jurisdiction based on Manchester Avenue being the first public road from the sea.

Nothing in the Commission's denial of the permit precluded ECDS from all economically viable use of its property. At any time, ECDS could have sought approval for the residential housing permitted by the applicable zoning or for a smaller school facility. Indeed, the staff report and the comments of the commissioners indicate that the concern was with the intensity of the development, not with any development on the property. Neither the Commission nor the staff ever took a position that would have precluded any development of the property.

In its reply brief, ECDS asserts it presented sufficient evidence on this issue and cites to the testimony of Geoffrey Mavis, the managing partner of M&M Development which currently owns the ECDS property. The record shows Mavis originally purchased the ECDS property in 1994 or 1995 for about $185,000. Eventually, the property was transferred to M&M Development. M&M Development and ECDS have entered into a letter of intent for a 99-year lease upon development of the school with the rent to be based on a percentage of the tuition received by the school. Mavis testified that it is contemplated that further details of the lease arrangement will be worked out at a later date. Mavis is not a developer and conceded he has no experience developing either residential or commercial property. He testified that he had received some inquiries from realtors who were interested in listing the property or selling the property to developers. When Mavis was asked if he had ever considered developing the property for residential use as it was zoned, he answered, "At an earlier time, I had talked to Mr. Crume [an adjacent property owner] about that. And he said that it was not economical to do that."

This evidence hardly supports a finding that the assertion of jurisdiction and denial of a permit to build a 432-student school resulted in a denial of all economically viable use of the property. The evidence that it was not economical to develop the property as zoned was mere hearsay. Furthermore, the expertise of Mavis's neighbor who gave the opinion is completely unknown. Mavis himself lacked any expertise as a developer to assess the economic value of the property as either a residential or commercial development. The fact that Mavis had paid only $185,000 for the property (less than $10,000/acre) tends to undercut a claim that the property could not be economically developed as residential property. Additionally, the fact that Mavis had been contacted by several realtors who wanted to list the property or knew of interested developers undercuts a conclusion that the property had no economic viability; indeed, the only reasonable inference from this evidence is that, as perceived by those in the business of marketing property (realtors), the property had economic value for development. Finally, we note as to ECDS that its lease with M&M Development was not final and it's liability for rent was dependent on its collection of tuition payments.

In sum, ECDS failed to meet the threshold requirement of showing that it was, even temporarily, deprived of all economically viable use of the property by the Commission's assertion of jurisdiction. This case was not ripe for adjudication, that is, there was no final ruling on the extent of development that would be permitted on the property.

Further, we note, based on the record before us, it does not appear that the Commission's assumption of jurisdiction over the ECDS project on the basis Manchester Avenue was the first public road from the sea was wholly arbitrary or capricious or so unreasonable as to lead to an inference it was done for the purposes of delay rather than representing a normal delay in the development process. While it is true that the Commission apparently had not asserted jurisdiction on this basis previously

and a map long used by the City showed that the first public road from the sea was Highway 101, it is also true that the Commission's regulations recognize the fact that maps do not necessarily reflect all land within the Commission's jurisdiction (see Cal. Code Regs., § 13576, subd. (a)), this fact is reflected on the map itself, and the City's map had never been certified nor officially adopted. Moreover, the record contains substantial evidence indicating that it was a debatable issue whether San Elijo Lagoon was the "sea" within the meaning of the Commission regulations. The record is also clear that if the portion of San Elijo Lagoon near the ECDS property is an arm of the sea, then the first public road is Manchester Avenue and ECDS's property is located between Manchester Avenue and the San Elijo Lagoon. In other words, based on the record on appeal, we cannot say that accepting Manchester Avenue as the first public road from the sea was a completely untenable legal position.

Neither can we say that the reasons stated by the Commission for denying the coastal development permit, based on the intensity of the development and its impact on the environment and Manchester Avenue do not reflect legitimate state interests. Nor does ECDS challenge the reasons for denying the permit as being arbitrary or capricious.

No reversal is merited on this ground.

IV

Motion to Lift Stay on Appeal

ECDS made a motion to partially lift the stay of the judgment on appeal to allow it to obtain a grading permit. The grading permit was a prerequisite to ECDS's obtaining land from the City to offset sensitive habitat land that would be destroyed by the ECDS project. ECDS feared the City's mitigation land would be depleted before its suit against the Commission could be resolved on appeal. The trial court

granted the motion for the limited purpose of allowing ECDS to obtain the grading permit and the City's mitigation land.

The Conservancy contends the trial court lacked jurisdiction to lift the stay on appeal and argues only the appellate court had power to do so. (See Code Civ. Proc., § 1094.5, subd. (g) ["If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order"].)

Since this issue is limited as to whether the trial court properly litted the stay while the case was pending on appeal and since we have resolved the appeal and affirmed the finality of the City's approval of the project, this issue has become moot.

"'Ordinarily, . . . when a case becomes moot pending an appellate decision "the court will not proceed to a formal judgment, but will dismiss the appeal."'" (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005.) However, "involuntary dismissal of an appeal operates as an affirmance of the judgment below." (*Ibid.*) "'Where an appeal is disposed of upon the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal. [Citations.]'" (*County of San Diego v. Brown* (1993) 19 Cal.App.4th 1054, 1090.)

Accordingly, we reverse the order partially lifting the stay and direct the trial court to dismiss as moot ECDS's motion.

DISPOSITION

The judgment is affirmed. The order is reversed and remanded to the trial court to dismiss as moot. The parties are to bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

_____

McCONNELL, J.

WE CONCUR:

_____

KREMER, P. J.

_____

HALLER, J.

Appendix B–1

FILED JULY 23, 2003

Court of Appeal, Fourth Appellate
District, Division One - No. D038323
S116790

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ENCINITAS COUNTRY DAY SCHOOL INC. et al.,
Plaintiffs and Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant;
SAN ELIJO LAGOON CONSERVANCY, Real Party in Interest and Appellant.
And Companion Case.

Petitions for Review DENIED.

Kennard, J., and Werdegar, J., are of the opinion the petitions should be granted.

Brown, J., was absent and did not participate.

GEORGE
Chief Justice

Appendix C–1

FILED JUNE 22, 2001

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ENCINITAS COUNTRY DAY SCHOOL, INC., a California Corporation, dba ENCINITAS COUNTRY DAY SCHOOL; KATHLEEN PORTERFIELD, an individual; and M&M DEVELOPMENT, LLC, a limited liability corporation, Petitioners and Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, a State agency, Respondents and Defendants.	CASE NO. 729619 [~~PROPOSED~~] JUDGMENT
SAN ELIJO LAGOON CONSERVANCY, a non-profit organization; and DOES 1-100, inclusive, Real Parties in Interest	

CITY OF ENCINITAS, a municipal corporation,

Real Party in Interest.

The above entitled matter came on regularly for trial on two separate occasions. The first was on March 3, 2000, the Hon. Linda B. Quinn presiding, in which the Court finally determined the First through Fourth Causes of Action of the First amended Petition and Complaint on file herein. Martin J. Mullen of Lewis, D'Amato, Brisbois & Bisgaard, LLP and Richard C. Jacobs of Howard, Rice, Nemerovski, Canady, Falk & Rabkin appeared for Petitioners and Plaintiffs Encinitas County [sic] Day School, Kathleen Porterfield and M&M Development LLC (collectively referred to herein as "the School"). Peter H. Kaufman, Supervising Deputy Attorney General, appeared for Respondent and Defendant California Coastal Commission ("the Commission") and Kevin K. Johnson of Johnson & Edwards, LLP appeared for Real Party in Interest the San Elijo Lagoon Conservancy ("the Conservancy"). After consideration, the Court issued a decision on April 12, 2000, granting the First Amended Petition for Writ of Mandate.

The second commenced on March 26, 2001, the Hon. Thomas O. LaVoy presiding. The parties were represented by counsel specified above. After completion of trial and consideration of the evidence, the Court issued a Statement of Decision on May 17, 2001, finding in favor of the Commission on the School's cause of action for inverse condemnation/regulatory takings and ruling that San Elijo Lagoon Conservancy was not a real party in interest with respect to that cause of action.

IT IS ACCORDINGLY HEREIN ORDERED, ADJUDGED AND DECREED:

1. The First Amended Petition for Writ of Mandate is granted. A writ of mandate shall issue to the Commission under seal of the Court directing the Commission to vacate its decision (Decision No. A-6-ENC-98-158) denying a coastal development permit for the School's project. The writ shall issue within 10 days of the date this judgment is entered and the Commission shall have 45 days within which to file its return.

2. This judgment is entered without prejudice to the parties seeking relief, as authorized by law, from the automatic stay effectuated through an appeal of this matter.

3. The Sixth and Seventh Causes of Action in the First Amended Complaint for Declaratory Relief and Injunction were not tried and are hereby dismissed.

4. The School's Fifth Cause of Action in the First Amended Complaint for inverse condemnation/regulatory takings is denied.

5. The School, with respect to the First through Fourth Causes of Action only, is awarded for its reasonable costs of suit against the Commission in the sum of $_____.

6. The Commission, with respect to the Fifth Cause of Action only, is awarded its reasonable costs of suit against the School in the sum of $_____.

Dated: June 22, 2001.

THOMAS O. LAVOY
Hon. Thomas O. LaVoy
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: 6/20/01.

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Martin J. Mullen
Martin J. Mullen
Attorneys for Petitioners and Plaintiffs Encinitas County [sic] Day School, Kathleen Porterfield and M&M Development LLC

Dated: June 20, 2001

HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN

By: /s/ Richard C. Jacobs
Richard C. Jacobs
Attorneys for Petitioners and Plaintiffs Encinitas County [sic] Day School, Kathleen Porterfield and M&M Development LLC

Dated: June 14, 2001

BILL LOCKYER, Attorney General of the State of California

By: /s/ Peter H. Kaufman
Peter H. Kaufman
Supervising Deputy Attorney General
Attorneys for Respondent/ Defendant California Coastal Commission

Appendix C–5

Dated: 14 June 2001

JOHNSON & EDWARDS LLP

By: /s/ Kevin K. Johnson
Kevin K. Johnson
Jared Phil Hanson
Attorneys for Real Party in Interest San Elijo Lagoon Conservancy

Appendix D–1

FILED MAY 17, 2001

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ENCINITAS COUNTRY DAY SCHOOL, INC., a California Corporation, dba ENCINITAS COUNTRY DAY SCHOOL; KATHLEEN PORTERFIELD, an individual; and M&M DEVELOPMENT, LLC, a limited liability corporation, Petitioners and Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, a State agency, Respondents and Defendants.	CASE NO. 729619 STATEMENT OF DECISION
SAN ELIJO LAGOON CONSERVANCY, a non-profit organization; and DOES 1-100 inclusive, Real Parties in Interest	

CITY OF ENCINITAS, a municipal corporation,

Real Party in Interest.

The trial of this matter on the cause of action for Inverse condemnation/regulatory takings commenced in Department 53 of the Superior Court before Superior Court Judge Thomas O. LaVoy, sitting without jury, on March 26, 2001. Representing plaintiffs Encinitas Country Day School, Inc., a California corporation, dba Encinitas Country Day School; Kathleen Porterfield, an individual; and M&M Development, LLC, a limited liability corporation (hereinafter collectively referred to as "the school") was Martin J. Mullen, Esq. and Richard C. Jacobs, Esq.; appearing for the California Coastal Commission, a state agency, was Peter H. Kaufman, Esq.; and appearing for San Elijo Lagoon Conservancy was Kevin K. Johnson, Esq.

The Court heard the testimony of eight witnesses, reviewed trial briefs filed on behalf of all parties, both pre- and post-trial, and reviewed multiple exhibits, including the majority of an extensive administrative record. Having reviewed and considered the evidence and testimony of the witnesses, the Court hereby issues the following Statement of Decision:

1. Plaintiffs have the necessary property interest to establish standing regarding the inverse condemnation/ regulatory takings cause of action.

2. San Elijo Lagoon Conservancy ("SELC") does not have legal standing in this matter and is not a "real party in Interest."

3. At best, SELC is an *amicus curiae*. As such, the Court has read and considered the briefs submitted by the SELC, its examination of witnesses and production of evidence

as well as its arguments in this matter in this light, and finds no prejudice suffered by plaintiffs as a result of this Court's erroneous ruling allowing SELC to participate at trial.

4. During the Coastal Commission's review of the school's project, the administrative staff was in control of the Commission whose members showed limited involvement in, or understanding of, the serious issues presented to it.

5. Apparently ignorant of the jurisdictional requirements of section 30621 of the Public Resources Code (i.e., the 49-day requirement), a majority of the Commission voted in compliance with staff recommendations to open and continue the school's project at the January 13, 1999 hearing.

6. Apparently ignorant of the historical precedents concerning the jurisdictional issue regarding the school's project, a majority of the Commission voted in compliance with staff recommendations to assert Manchester as first public road for purposes of appellate jurisdiction.

7. Apparently ignorant of the requirements of Regulation 13576 (i.e., required procedure for the Coastal Commission to designate appellate jurisdiction), a majority of the Commission voted in compliance with staff recommendations to assert Manchester as first public road for purposes of appellate jurisdiction.

8. The California Coastal Commission's interpretation of Public Resources Code section 30621, and the legal positions resulting therefrom were reasonable to the extent that perhaps some rational attorney could believe that the arguments being pursued had merit. The legal positions taken at the hearings of January 13, 1999, and February 4, 1999, concerning an interpretation of section 30621 of the California Public Resources Code, were based on a rather strained interpretation of *Coronado Yacht Club v. California Coastal Commission* (1993) 13 Cal.App.4th 860 and the Commission's success in an

unreported decision in another jurisdiction entitled *Bell v. California Coastal Commission*. On that basis, the acts of the Commission, in blindly following staff recommendation to "open and continue," made as early as December 10, 1998, by Sherilyn Sarb of the San Diego Coastal Commission staff, though wrong, were reasonable.

9. The Coastal Commission's actions thereafter in refusing to thoroughly consider the jurisdictional issues at any subsequent hearing and the denial to entertain the school's request for reconsideration at the May 12, 1999 hearings are closer questions. However, this Court is unable to rule that the Commission's actions were so arbitrary and unreasonable at the February 4, 1999 and May 12, 1999 hearings "as to lead to the conclusion that they were taken for no purpose other than to delay the development project before it." *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal. 4th 1006 at 1024.

10. The Coastal Commission's position concerning the first public road to be Manchester Road for purposes of appellate jurisdiction was not developed prior to its staff's assessment of the school's project.

11. As early as 1981 and at each subsequent remapping in 1988 and 1995, the Coastal Commission itself consciously adopted Highway 101 as the first public road.

12. Since 1981, the draft certification map was circulated to the public and relied upon by the public, the City of Encinitas, and the Coastal Commission staff itself in issuing jurisdictional opinions on at least two prior occasions. In planning the Encinitas Country Day School project, the Plaintiffs were entitled to rely upon, and did rely upon, the repeated public statements of the Commission and its staff with regard to the limited appellate jurisdiction of the Commission.

13. While the evidence presents a compelling argument of estoppel on behalf of the plaintiffs as against the California Coastal Commission, this Court does not adopt, nor did it utilize estoppel principles in reaching the above decision.

14. Somehow within 48 hours from December 10, 1998, through December 11, 1998, the Coastal Commission staff, completely bypassing Regulation 13576, obviated the jurisdictional map in effect since 1981 and extended its jurisdiction over the school project and other property by asserting Manchester as first public road for purposes of appellate jurisdiction.

15. Apparently, the Commission staff relied on the fact that since 1981, the word "draft" on the map allowed it to arbitrarily change the jurisdictional lines on the map whenever it decided to do so. It is hard to think of a more unreasonable and arbitrary position.

16. The director of the Commission's San Diego staff, after twenty years on the job, was completely ignorant of the Commission's own maps circulated continuously to the public since 1981 and relied upon by her own staff. This fact is sobering at best.

17. The Court concludes that many of the reasons offered by the Commission's staff for its actions were pretextual, and that the staff's actions were in fact taken for no purpose other than to delay the project.

18. Based on *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442; *Board of Supervisors of Alameda v. Superior Court* (1983) 147 Cal. App.3d 206; *Pickwick Corporation v. Welch*, 21 F. Supp. 664 (1937) and the cases previously cited, the Court concludes that the Commission is not bound by the acts of its staff members. This is not an entirely satisfactory conclusion for this Court, as evidenced by its questions during final argument. In this Court's opinion, a

staff which obviously dominates an agency's commissioners should bind the commission in conformity with the comments by Commissioner McClain-Hill (A.R. 23:4863-4865). Unfortunately, such is not the law.

19. Therefore, based on the legal conclusion that the ads of the staff may not be attributed to the Commission (as set forth in paragraph 18), the extraordinarily high standard for determining that error by the Commission constitutes a regulatory-delay "taking," precludes an award of damages against the Commission. The Court therefore finds in favor of the California Coastal Commission, a state agency, respondent and defendant.

20. Plaintiffs have been denied sufficient economic use of the subject property based on the limited facts of this case, such that the Commission's actions would have constituted a taking if this Court had not found that the legal arguments advanced in support of the Commission's erroneous conclusions were not completely unreasonable from a legal standpoint.

21. California Coastal Commission is directed to prepare a judgment reflecting this decision.

IT IS SO ORDERED.

DATED: May 17, 2001

/s/ Thomas O. LaVoy
THOMAS O. LaVOY
Judge of the Superior Court

THOMAS O. LAVOY

Appendix E–1

FILED APRIL 12, 2000

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

DATE: APRIL 12, 2000 **DEPT. 74** **REPORTER:**
CSR#:

PRESENT HON: LINDA B. QUINN
JUDGE

CLERK: MARY JEAN BARHAM

BAILIFF:

REPORTER'S ADDRESS:
P.O. BOX 120128
SAN DIEGO, CA 92112-4104

729619 ENCINITAS COUNTRY DAY SCHOOL, INC., a California Corporation, dba ENCINITAS COUNTRY DAY SCHOOL; KATHLEEN PORTERFIELD, an individual; and M&M DEVELOPMENT LLC, a limited liability corporation,

Petitioners and Plaintiffs,

vs.

CALIFORNIA COASTAL COMMISSION, State agency,

Respondents and Defendants.

Appendix E–2

SAN ELIJO LAGOON CONSERVANCY, a non-profit organization; TINKER MILLS, an individual; and DOES 1-100, inclusive,

Real Parties in Interest

CITY OF ENCINITAS, a municipal corporation,

Real Party in Interest.

The First Amended Petition for Writ of Mandate is granted. The decision of Respondent California Coastal Commission denying the CDP for Petitioner's project is set aside. The approval of the CDP by the City of Encinitas is final.

The Commission's jurisdiction finding is not supported by substantial evidence. The Commission's determination of First Public Road (FPR) jurisdiction over the project is invalid. There is insufficient evidence to find that the Commission claimed FPR jurisdiction relative to the Fletcher and Kirkorowicz projects. The Commission never asserted that Manchester Ave. was the first public road for purpose of appeal jurisdiction before the hearing on Feb. 4, 1999. From the time the Encinitas LCP was certified through Feb. 4, 1999, the Commission had not made any boundary determination that designated Manchester Ave. as the first public road. To the contrary, all documents that existed and the uniform practice of the Commission reflect that the Commission acquiesced to the proposition that Old Highway 101 was the first public road as shown on the draft map of the area prepared by the Commission's Mapping Unit. The Commission may not assert that Manchester Ave. is the first public road for purpose of appeal jurisdiction as of Feb. 4, 1999, a point in time that the

Commission's Mapping Unit had not even issued such an opinion or "draft" map.

The Petitioner's challenge to the Commission's determination of jurisdiction is not barred by res judicata. The Petition was timely filed following a final agency decision on the merits.

The Commission failed to resolve the substantial issue questions within the forty-nine day period mandated by PRC sections 30621 and 30625. The Commission's act of opening and continuing the agenda matter on Jan. 13,1999 without resolving the substantial issue question did not comply with section 30621 (Coronado Yacht Club v. California Coastal Commission (1993) 13 Cal. App. 4th 860). The evidence does not support a finding that Petitioner waived its right by failing to object to the action of opening and continuing the agenda matter on Jan. 13, 1999.

Dated: April 12, 2000

/s/ Linda B. Quinn
Honorable Linda B. Quinn
Judge of the Superior Court

Appendix F–1

FILED JUNE 5, 2003

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ENCINITAS COUNTRY DAY SCHOOL, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Appellant; SAN ELIJO LAGOON CONSERVANCY, Real Party in Interest and Appellant.	D038323 (Super. Ct. No. 729619)
ENCINITAS COUNTRY DAY SCHOOL, INC., et al., Plaintiffs and Respondents, v.	D040300 (Super. Ct. No. 729619)

CALIFORNIA COASTAL COMMISSION, Defendant; SAN ELIJO LAGOON CONSERVANCY, Real Party in Interest and Appellant.	**ORDER DENYING REHEARING**

THE COURT:

Petitions for rehearing filed on behalf of Encinitas Country Day School Inc., et al., Plaintiffs and Appellants; California Coastal Commission, Defendant and Appellant; and San Elijo Lagoon Conservancy, Real Party in Interest and Appellant, are denied.

/s/ Kremer
KREMER, P. J.

Copies to: All parties